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**Datasheet for the decision
of 9 September 2015**

Case Number: T 1738/11 - 3.2.04

Application Number: 05704698.9

Publication Number: 1703789

IPC: A01K5/02, G01N21/35, A23K1/00

Language of the proceedings: EN

Title of invention:
ARRANGEMENT AND METHOD FOR FEEDING ANIMALS

Patent Proprietor:
DeLaval Holding AB

Opponent:
Octrooibureau Van der Lely N.V.

Headword:

Relevant legal provisions:
EPC Art. 104(1), 108
RPBA Art. 12(2), 12(4), 13(1), 13(3)

Keyword:
Admissibility of appeal -
grounds of appeal sufficiently substantiated (yes)
Admissibility of late filed submissions (no)
Different apportionment of costs (no)

Decisions cited:

G 0010/91, G 0007/95, T 0145/88, T 0922/05, T 1581/08,
T 2532/11

Catchword:

Reasons 1.1, 1.3-1.5, 2, 3.2-3.3



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 1738/11 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 9 September 2015

Appellant: Octrooibureau Van der Lely N.V.
(Opponent) Weverskade 110
3147 PA MAASSLUIS (NL)

Representative: Jennen, Peter Leonardus Hendricus
Octrooibureau Van der Lely N.V.
Cornelis van der Lelylaan 1
3147 PB Maassluis (NL)

Respondent: DeLaval Holding AB
(Patent Proprietor) Box 39
147 21 Tumba (SE)

Representative: Jennings, Michael John
A.A. Thornton & Co.
10 Old Bailey
London EC4M 7NG (GB)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
23 May 2011 concerning maintenance of the
European Patent No. 1703789 in amended form.**

Composition of the Board:

Chairman A. de Vries
Members: E. Frank
C. Schmidt

Summary of Facts and Submissions

- I. The appeal lies from the decision of the opposition division, dated 13 April 2011 and posted on 23 May 2011, to maintain the European patent No. 1 703 789 in amended form pursuant to Article 101(3) (a) EPC. The appellant (opponent) filed a notice of appeal on 26 July 2011, paying the appeal fee on the same day. The statement of grounds of appeal was submitted on 3 October 2011.
- II. The opposition was filed against the patent as a whole and based ostensibly on Article 100(a) in conjunction with Articles 52(1), 54 and 56 EPC, with arguments given only for lack of inventive step in the light of documents. The opposition division held that the main request submitted during the oral proceedings met the requirements of the EPC. It found that the independent claims as amended involved an inventive step contrary to the sole objection raised by the opponent. In its decision the division considered the following prior art, amongst others:
- D17 = US 6,556,948 B1
- III. The further following documents were cited in appeal:
- D21 = EP 1 523 874 A1
D22 = DE 199 40 084 A1
D23 = EP 1 053 671 A1
- IV. A communication pursuant to Article 15(1) RPBA was issued after a summons to attend oral proceedings, which were duly held on 9 September 2015.

- V. The appellant requests that the decision under appeal be set aside and the patent be revoked.

The respondent (proprietor) requests that the appeal be rejected as inadmissible, alternatively that it be dismissed, i.e. the patent be maintained in the amended form held allowable by the opposition division (as main request), or that the decision under appeal be set aside and the patent be maintained in amended form on the basis of the auxiliary request filed with response to the grounds of appeal dated 20 April 2012.

Moreover, the respondent requests a different apportionment of costs.

- VI. The wording of claim 1 of the main request as found allowable by the opposition division reads as follows:

"A feeding system (12; 16) for feeding animals on a farm, characterized in

- an analyzer device (13; 17) provided on the farm for measuring in real time or near real time the amount of at least one constituent of solid feed to be fed to said animals;
- a computer-based processing and control device (11, 15) provided for controlling said analyzer device to measure the amount of the constituent of the solid feed repeatedly and at least once a day; and
- a feeding device (14; 18) provided for feeding said animals, wherein
- said computer-based processing and control device is provided for controlling said feeding device to feed said animals repeatedly and at each instant depending on the last one of said repeatedly performed measurements; and wherein said feeding device is a

vehicle (14) filled with said solid feed, and said on-farm analyzer device (13) is provided at said vehicle for measuring the amount of said constituent of said solid feed."

VII. The appellant argued as follows:

The appeal is admissible in line with the established jurisprudence. Although lack of novelty had not previously been raised, a new search had led to D21, D22, and D23, which were found to deprive claim 1 of novelty. As regards the prima facie evaluation of lack of inventive step of claim 1, D22 indeed prima facie discloses an analyser device on the forage mixing vehicle, viz. the weighing based on sensors, cf. D22, col. 3, lines 11-19. Moreover, par. 0019 of D23 prima facie describes digestible additives ("Silierstoffe") in the harvesting wagon ("Ladewagen"), thus suggesting a feeding vehicle as in claim 1. Therefore, the lines of attack filed with the grounds of appeal, i.e. D22 or D17 in the light of D23, should be admitted into the proceedings. Finally, the late submissions with letter dated 29 July 2015 should also be admitted, since, although the lines against inventive step were based on new arguments, common general knowledge or the documents referred to had already been on file before. A different apportionment of costs is not justified, since the respondent has the duty to prepare the case; when they dropped their requests at the oral proceedings before the opposition division, the appellant had also not requested reimbursement.

VIII. The respondent argued as follows:

The grounds of appeal fail to identify any reasons that suggest why the impugned decision might be incorrect.

All arguments presented by the appellant rely on late-filed documents that lack prima facie relevance. In other words, the appellant effectively attempts to file a new opposition. Thus, also following from T 2532/11, T 145/88, T 1581/08, and T 922/05, the present appeal is inadmissible. The introduction of the fresh ground of novelty is not agreed to. Moreover, D22 prima facie does not disclose or hint at an analysis which is carried out in real time on the feed vehicle. D23 prima facie concerns a harvesting wagon which cannot be used as feeding vehicle. There is no disclosure or hint that the "Silierstoffe" in par. 0019 of D23 are other than additives for preservation. Thus, the new lines of attack against inventive step of claim 1 belatedly filed with the grounds of appeal should not be admitted into the proceedings. Moreover, with letter of 29 July 2015 the appellant's case in respect of lack of inventive step again is substantially changed and, therefore, these submissions also should not be admitted at that stage of the proceedings. Finally, if the appellant does not withdraw its appeal based on late amendments of the appellant's case and low relevance documents, and the patent is upheld in its current form, the respondent's appeal costs should be met by the appellant.

Reasons for the Decision

1. *Admissibility of the appeal*
 - 1.1 The respondent argues that the statement of grounds of appeal almost completely failed to identify reasons why the appellant opponent considered the decision under appeal to be wrong. Rather, the appellant opponent's arguments brought forward related to completely new and irrelevant documents D21, D22, and D23. Presenting new

facts and evidence in the grounds of appeal constituted a new opposition and, therefore, the appeal was inadmissible.

- 1.2 The Board agrees with the respondent that an appeal unconnected with the reasons given in the present appealed decision (lack of inventive step), and directed only to a new ground of opposition based on a new document, would not be within the same legal and factual framework as the opposition proceedings. This indeed would be tantamount to a new opposition.
- 1.3 However, in the view of the Board, the present grounds of appeal sufficiently substantiate lack of inventive step, even if somewhat succinctly formulated and based on new evidence (combination of D22 or D17 with D23), see statement of grounds of appeal dated 3 October 2011, page 2, last paragraph to page 3, second paragraph. It is established case law that an appeal raising a case different from that on what the decision under appeal was based ("fresh case") but on the same opposition ground, is in principle admissible, cf. Case Law of the Boards of Appeal, 7th edition, 2013 (CLBA hereafter) IV.E.2.6.5 and the case law cited therein. The Board sees no reason to diverge from this well-established approach.
- 1.4 The respondent cites various case law that would demonstrate inadmissibility in the present case. T 2532/11, see reasons 2.4, is less applicable to the present case, since it addresses the question of whether or not the filing of new requests by an appellant proprietor can be seen as implicit grounds of appeal. T 145/88, see reasons 2, and T 1581/08, see reasons 4.3, relate to insufficient substantiation of the grounds in relation to evidence before the first

instance. This is also true for T 0922/05 (see reasons 13), where a missing logical chain between amendments and novelty over documents cited in first instance leads to a finding of lack of substantiation. Thus, the Board is unconvinced of the relevance of these decisions to the present case.

1.5 Finally, whether or not the newly filed documents D21, D22, and D23 are relevant does not relate to the question of admissibility of the appeal as argued by the respondent, but rather to admissibility under Article 114(2) EPC of late facts and evidence into extant proceedings. This presupposes that the appeal is found admissible beforehand. Therefore, the possibility that facts and evidence submitted for the first time with the grounds of appeal may be disregarded at the discretion of the Board, Article 12(4) RPBA, does not in principle affect the admissibility of the appeal.

1.6 In summary, the Board holds that the statement of grounds of appeal fulfils the requirements of Article 108 EPC, third sentence, in conjunction with Rule 99(2) EPC. As otherwise the notice and statement of grounds have been filed in due form and time in accordance with the EPC, the Board concludes that the present appeal is admissible.

2. *Admissibility of fresh ground of opposition*

The Board notes that, though lack of novelty is indicated as an opposition ground on form 2300 and mentioned in the heading on page 2 of the accompanying letter, the original notice of opposition of 8 December 2008 contains no explanation why the claimed subject-matter might lack novelty, but rather includes arguments directed exclusively against inventive step.

The ground of lack of novelty is therefore not substantiated in the appellant-opponent's notice of opposition. Nor was it otherwise subject of the opposition proceedings, the issue neither being identified by the division in its communication annexed to the summons of 30 September 2010 nor discussed at the oral proceedings of 13 April 2011, see the minutes. Therefore, the ground of lack of novelty was not properly submitted and substantiated in opposition. Following G10/91 (OJ 1993, 420), see headnote II, and G7/95 (OJ 1996, 615), see headnote, it therefore constitutes a fresh ground of opposition, which may not be introduced into the appeal proceedings without the agreement of the respondent proprietor. The respondent proprietor has expressly stated that he does not agree to its introduction, see minutes of the oral proceedings before the Board. This being the case, the Board must disregard the ground of lack of novelty and the corresponding arguments based on late filed documents D21, D22, and D23.

3. *Admissibility of late submissions*

3.1 In the statement of grounds of appeal the appellant presents two new lines of attack against inventive step of claim 1, namely starting from D22 in the light of D23, and starting from D17 in the light of D23. Both documents D22 and D23 were filed late with the grounds of appeal and are thus subject to the discretion afforded under Article 114(2) EPC.

As to their prima facie relevance, the Board concurs with the respondent that, firstly, D22 does not appear to disclose or hint at feed analysis that takes place on the described forage mixing vehicle ("Futtermischwagen 1"). Nor does D22 suggest that the

analysis of constituents is carried out in real time, as also required by claim 1 of the patent. Rather, the feed is analysed remotely at a different place at a different time and then data can be sent to a receiver on the vehicle, see D22, col. 3, lines 1 to 9, and reference numbers indicated 23,24 in fig. 1. Contrary to the appellant's view, the weight sensors 20,21 (fig. 1) merely seem to feed back to the process and control unit 19 the control input of the required feed dosage ratio of the basic fodder mix, which has been analysed externally beforehand, cf. D22, col. 3, lines 11 to 20.

Secondly, D23, cf. abstract, prima facie is concerned with the use of a measuring instrument for determining the proportion of certain constituents in a harvested crop ("Erntegut"). Its possible application to a "Ladewagen", cf. paragraph 0019 in col. 4, or forage harvester, a machine commonly used to harvest grass etc. for forage, for controlling dosage of "Silierstoffe", i.e. additives that promote ensiling of forage, does not result in a feeding vehicle with on board feeding device as claimed. Thus, D23 prima facie does not appear to suggest or hint the principal subject-matter of claim 1.

- 3.2 Following from above, neither D22, nor D23 prima facie could have led the skilled person in particular to an on-farm analyser device provided at a feeding vehicle for measuring in real time the amount of at least one constituent of solid feed to be fed to the animals according to claim 1 of the main request.

Therefore the Board exercised its discretion not to admit the appellant's submissions as regards lack of inventive step of claim 1 in the light of D22 or D23

into the proceedings, Article 12(4) RPBA in conjunction with Article 114(2) EPC.

- 3.3 The appellant filed further arguments against inventive step with letter of 29 July 2015, that is, after the oral proceedings before the Board were arranged. In particular pages 2 to 5 discuss in considerable detail a combination of D22 with D5, D19, D23 and or common general knowledge. The new lines of attack differ substantially in content and detail from those submitted originally in the statement of grounds, see above. Such a substantial change in the appellant's case is subject to the discretion afforded the Board under Article 13(3) RPBA.

These new lines of attack are based on documents D22 and D23 that the board has already held to be not prima facie relevant. It is not apparent to the Board what justification might exist for it to reconsider that finding and allow the appellant a further opportunity to argue an essentially new and different case, and to do so in much greater detail than in the initial statement of grounds. The claims are unchanged and the case remains the same, i.e. there have been no unexpected developments to respond to. Nor are these new lines of attack somehow subsumed in the general reference to earlier first instance argument. Apart from the fact that according to case law an appellant cannot rely on such references to substantiate an appeal (see CLBA, IV.E.2.6.4 and the case law cited therein in reference to Article 12(2) RPBA), that earlier argument can hardly provide a basis for these new lines of attack as it is based on different documents.

3.4 Under these circumstances the Board does not consider it equitable for the respondent to have to answer this new case made at this very late stage in the proceedings. It therefore decided not to admit the appellant's submissions dated 29 July 2015 pursuant to Articles 13(1) and (3) RPBA.

4. The appeal relies entirely on new evidence and late submissions, none of which have been admitted into the proceedings. The Board can but conclude that the appeal is without merit and must fail.

5. *Apportionment of costs*

The Board firstly cannot see any abuse in the filing of an appeal by a party entitled thereto. This holds true even if the appeal is clearly without merit as in the present case. Moreover, the parties are entirely entitled to attempt to file late submissions in the course of inter partes proceedings, be it new facts, arguments, and evidence, or new requests. Given that the case is not remitted to the first instance, the respondent has not incurred any costs other than those that are to be expected in the course of appeal proceedings. The Board is also unable to establish any procedural abuse by the appellant that might have justified a different apportionment of costs. Therefore, there is no reason for the Board to depart from the principle that each party to inter partes proceedings must bear its own costs.

Order

For these reasons it is decided that:

1. The appeal is dismissed.
2. The request for a different apportionment of costs is refused.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated